Supreme Court, U.S.
FILED
MAR 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-224

In The
Supreme Court of the United States
October Term, 1985

CITY OF RIVERSIDE, LINFORD L. RICHARDSON, MICHAEL S. WATTS, DAN PETERS, GERALD MILLER, and ROBERT PLAIT,

Petitioners,

vs.

SANTOS RIVERA, JENNIE RIVERA, DONALD RIVERA, JEROME RIVERA, LEE ROY RIVERA, MARK LARABEE, ENRIQUE FLORES, AND MANUEL FLORES, JR.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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QUESTIONS PRESENTED

1.

Whether "a reasonable attorney's fee" awarded under Section 1988 of Title 42 of the United States Code must bear some proportionality to the amount of the judgment obtained by the party seeking such fees in a case in which monetary relief only was pursued and/or obtained.

2.

Whether an award of attorney's fees under Section 1988 of Title 42 of the United States Code more than seven times the amount of a judgment obtained in a suit for monetary relief only constitutes an abuse of discretion by the trial court.

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Much of the Brief of Respondents (R.B.) is spent in an attempt to convince this Court that Petitioners urge some kind of blanket "mechanical proportionality" standard be adopted in the awarding of attorney's fees under 42 U.S.C. § 1988, followed by reasons why such a standard is not compelled by § 1988 (R.B. 19, 21). Such posturing not only is cleverly calculated to focus this Court's attention away from the real issues herein, but also pointedly ignores the fact that Petitioners have never proposed, or even inferred, the adoption of such a mechanistic test in all cases. To so argue would be to deny the myriad of differences which exist in the types of cases which can be, and are brought by civil rights litigants under the various civil rights statutes (42 U.S.C. 1981, 1982, 1983, 1985, and 1986) as well as the equally diverse types of relief which may be obtained thereunder.

Rather, what Petitioners have long argued that § 1988 compels—both in its legislative history, and particularly, by its own clear language—is that there must be some relationship between any attorney's fees awarded under that statute and the results obtained by any litigation brought under the civil rights umbrella. It is this relationship between the results obtained and the fees awarded which is at the heart of this matter, and nothing else.

That such a relationship was of paramount concern to Congress is clear from the wording which that body chose in adopting § 1988, providing, in the appropriate instances, that a trial court may award a "reasonable" attorney's fee. Thus, the focus of this case, and, as this Court has recognized in its previous decisions, the focus of nearly every other case in which the implementation of § 1988 has been reviewed, almost always turns on the meaning of the word "reasonable" when viewed against the conduct of a trial court in awarding attorney's fees.

Obviously, "reasonable" is not a legal term of art, but, rather, is a word of common and general usage. It has no esoteric definitions, no hidden meanings.[1] It is a word easily understood by the average man, and so too should be easily understood by district court judges, although in far too many situations, that is not always true. One thing is clear, however, and that is that the definition of "reasonable" is precise enough that it cannot be used to describe conduct which is irrational, which is not based upon the exercise of sound judgment, or which is excessive.

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[1] *The living Encyclopedic Dictionary of the English Language,* published by the English Language Institute of America, Chicago (1977), defines "reasonable" as follows: "agreeable to reason or sound judgment, as a reasonable supposition; rational; having or exercising sound judgment; not exceeding the limit prescribed by reason, or not excessive; moderate, as charges or prices."

Roget's International Thesaurus, published by Thomas Y. Crowell Company, New York, lists the following synonyms for "reasonable": "moderate, logical, plausible, credible, intelligent, wise, sane, inexpensive, vindicable, and justifiable."

In other words, a "reasonable" attorney's fee cannot, by definition, if not by law, be one which, *as herein:*

(1) exceeds by seven times the amount awarded by a jury in a case in which only money damages are awarded;

(2) is made without the benefit of detailed, contemporaneously-kept time records;

(3) is awarded for all time expended, when success is achieved on a small percentage of the claims pursued, and against fewer than 20% of the defendants litigated against;

(4) achieves no societal benefit, beyond the pecuniary award to the individual litigators;

(5) results from an on-the record refusal of a trial court to follow the remand instructions of this Court following the reversal of a previous award of attorney's fees (J.A. 225; 230).

Indeed, nothing this Court has done or said to date in reviewing cases arising under § 1988 has departed in any way from a recognition by it that for an attorney's fee to withstand scrutiny under that statute, it must, by definition, be reasonable.

As an example, in *Hensley v. Eckerhart,* 461 U.S. 424, 103 S.Ct. 1933 (1983), this Court noted that merely finding that the extent of relief obtained by a prevailing party clearly justifies an award of attorney's fees under § 1988 does not end the trial court's inquiry, since:

> A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole.

Hensley, supra, 461 U.S. at 440, 103 S.Ct. at 1943

The logic behind such a statement is clear enough—any other result would not follow Congress' dictates that only a "reasonable" attorney's fee be awarded under § 1988. As Justice Powell clearly stated:

> . . . [w]here the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained.
>
> *Hensley*, supra, 461 U.S. at 440, 103 S.Ct. at 1943

Although Respondents do not charge that this Court was urging the adoption of a standard of "mechanical proportionality" by setting forth that for an award of attorney's fees to be reasonable, there must be some "relation" between the sums awarded and the results obtained in the underlying litigation, what Justice Powell stated in the above quoted passage is exactly the position taken by the Petitioners herein. For obvious reasons, Respondents would have this Court believe otherwise.

Likewise, *Hensley* clearly stands for the proposition —also advocated by Petitioners herein—that for a "reasonable" attorney's fee to be awarded, "there must be detailed records of time and services for which the fees are sought" (*Hensley, supra*, 461 U.S. at 440, 103 S.Ct. at 1943)

As Chief Justice Burger stated in his concurring opinion therein:

> . . . [t]he party who seeks payment must keep records in sufficient detail that a neutral judge can make a fair evaluation of the time expended. . ."
>
> *Hensley, supra*, 461 U.S. at 441, 103 S.Ct. at 1943

The rationale behind such a statement is clear: to award attorney's fees absent the type of billing records which could normally be expected in any attorney-client context, given human temptation, not only would not be reasonable, but, moreover, could lead to the awarding of the very type of windfall fees which Congress claimed was not the intent of § 1988. H.R. Rep. No. 94-1558, p. 9 (1976); S.Rep. No. 94-1011, p. 6 (1976). Indeed, because § 1988 allows easy access to the fee purse, i.e., a party bringing a claim thereunder only has to prevail on one claim against one defendant in order to be adjudged a "prevailing party," implementation of the intent of the statute, as well as by its own words, relies on reasonableness in order to meet the twin goals of providing access to meritorious claims, while preventing windfalls to those with claims lacking significant merit.

And while providing access for meritorious civil rights claims is the reason often given for the enactment of § 1988, it does not follow therefrom that it was ever the intent of Congress to chill good faith defenses of such claims as a result. Clearly, there is nothing in the legislative history herein to indicate that what Congress had in mind was the forcing or extorting of settlements for fear that losing only one of the many claims filed by a civil rights plaintiff might open wide the coffers of this nation's state and local governments for all time spent on "related," thought totally unsuccessful claims, especially cases involving non-representative claims which culminate in awards of monetary damages only. Such a result not only would encourage the churning of marginal cases, but also, could not result in attorney's fees which are "reasonable."

The inciting of litigation must be distinguished from the providing of court access, and yet, the award of attorney's fees in this matter achieves only the former at the expense of the latter. It also continues the apparent belief among some sectors of the bar that § 1988 has become an end, rather than a means to an end. The lineup of amici supporting Respondents' position well illustrates this point, since, with the exception of the NAACP Legal Defense and Education Fund (which, itself relies heavily on the availability of a pool of volunteer attorneys), all of them are representatives of attorneys who *themselves* would benefit the most from the overexpansive interpretation of § 1988 reflected by the trial court's award of fees below.

In sum, it hardly seems that the societal interest of having *all* civil rights actions in our courts is so compelling that it justifies ignoring the real value or merit of each case, principally to insure the existence of a cadre of attorneys ready to handle all such cases as they arise. Rather, it is clear that the value or merit of each case to society as a whole must be examined by a district court before a "reasonable" attorney's fee may be awarded under § 1988, and that this examination must balance the amount of legal work done with the results obtained by such work before any such attorney's fee may be awarded. In cases which conclude in obvious societal benefits, such as those cited throughout the briefs of Respondents and their amici (R.B. 35; Brief of Washington Council of Lawyers, et al, p. 11), the value of encouraging court access through awards of attorney's fees based on verifiable market rates for all time necessary to achieve such results seems a sound one.

On the other hand, herein there was no societal benefit achieved other than that which deters future wrongful conduct by *any* potential defendant after *any* litigation of *any* type ending in a plaintiff's judgment. True, Respondents vindicated *their* civil rights, and true, this vindication does have value—as set by the jury it was $33,350. Respondents' arrogant protestations notwithstanding (R.B. 33, fn. 59), it simply defies belief that there do not exist within the private bar many attorneys who would not leap at the opportunity of recovering the equivalent of the normal free-market negotiated contingency fee for such litigation. This would mean that herein, such counsel could have expected to receive court-ordered attorney's fees, payable by the losing side and not out of his or her client's share of the judgment, of from $11,116 to $13,340 for success of the magnitude of that achieved by Respondents' counsel herein, based on a percentage (or proportion) of the results obtained of from 33⅓ to 40% of the total judgment.

Obviously, such a result would not allow civil rights attorneys to litigate to their hearts' content, on theories without merit, and against parties without liability, secure in the knowledge that they would be fully recompensed thereafter, as long as they achieved prevailing party status, and that their time was, somehow "related" to their so doing. But such a fee and such a result would be "reasonable," and would, therefore, comport with the language of § 1988, as enacted by Congress.

II. Respondents Are Attempting To Justify The Award Of Attorney's Fees Herein On The Case Which They Lost, Recognizing That Such An Award In The Case Which They Won Would Not Be Reasonable

The Brief for Respondents is little more than an attempt to justify the unjustifiable award of attorney's fees herein by arguing that such an award was reasonable, based not on what Respondents proved through their litigation and at trial. but, rather, what they wished they had proved, had the facts been otherwise. Further, they have proceeded on this course without informing this Honorable Court of this discrepancy.

As such, the Statement of Facts contained in Respondents' Brief largely is not a statement of facts at all. Therein, Respondents seek to retry this case before this Honorable Court by attempting to place into the record at this late date that which the jury below considered and rejected, and that which was never in the record at all. Their purported Statement of Facts is nothing more than a rewrite of their opening argument at trial, combined with what was placed before the jury and largely disbelieved by that same trier of fact. It is based in great part on out-of-context snippets from their own depositions (which are, in practically every instance, refuted by other depositions and testimony which they chose not to mention), documents not contained in the *Joint* Appendix to which they stipulated, and documents previously unmentioned or unreported, either before trial, during trial, after trial, or at all (e.g., the Riverside *Press* story mentioned for the first time at R. B. 10, fn. 13). Indeed, a comparison between Respondents' Statement of Facts herein, and

the quite dissimilar Statements of Facts/Statements of the Case(s) which they have adopted in previous briefs during the long life of this litigation, reflects the abject desperation faced by attorneys trying to justify the unjustifiable—an award of attorney's fees seven times the amount received by their clients in a case in which money damages only were awarded, and these damages, against fewer than 20% of the defendants against whom they chose to litigate.

Unfortunately, space does not permit Petitioners to point out all the discrepancies between the facts, as reflected by the record herein, and those things on which the record is silent (or quite different), but which are contained in Respondents' Statement of Facts nevertheless. However, so that this Court may at least get the flavor of what is being attempted by Respondents so as to make their case seem to be something that it clearly is not, a few examples are in order:

(a) Respondents spend nearly four pages on their brief (R.B. 10-13) trying to *prove* that Petitioners were engaged in a "cover-up" of the events which gave rise to the instant lawsuit. Much of their argument which follows is based upon this purported "cover-up." Indeed, this is not the first time Respondents have attempted such a scenario, but thus far herein, they have never been successful in getting anyone to believe it. Indeed, it was because of this asserted cover-up that counsel for Respondents justified their refusal to dismiss from this action most of the officers against whom they proceeded to trial, including the Riverside Chief of Police, Fred Ferguson. However, no cover-up was ever proven, and the jury found no liability as to *any* of the police officers sued by Re-

spondents on the basis of a cover-up alone, although the trial court did award attorney's fees to Respondents for such needless and unmeritorious litigation.

If such a cover-up had taken place, and was proven, such would be the very type of conduct which could have justified, in some measure at least, a significant award of attorney's fees. Hence, any cover-up by the Riverside Police of their own misconduct would have been an integral part of Respondents' case, and could be expected to have been highlighted by Respondents (and by the courts which made and subsequently reviewed the award of attorney's fees) wherever possible. And yet, there was *no mention* by the trial court which made the fee award herein of any cover-up, either in its initial set of Findings of Fact and Conclusions of Law (J.A. 173-175) or in its second set of Findings of Fact and Conclusions of Law (J.A. 187-192), both of which were prepared for the trial court *by Respondent's attorneys* (J.A. 222; 239-240). Neither is there any mention of a cover-up in the two opinions written by the Ninth Circuit herein (J.A. 176-183, *Rivera v. City of Riverside,* 679 F.2d 795 (9th Cir. 1983); J.A. 193-198).

Relying upon (and emphasizing) an unproven cover-up at this late date in order to demonstrate some justification for the outrageous award of attorney's fees herein speaks eloquently of Respondents' reluctance to accept the facts in this matter as they actually transpired, and as are duly reflected by the record below, not to mention the verdict of the triers of fact—the jury.

(b) Likewise, the trial court had no evidence before it of any kind from any of the *Respondents,* that any of

them had searched at length (or at all) for local counsel to represent them before engaging then-San Diego located counsel, Messrs. Lopez and Cazares. Still, both the Respondents and one of their amici (Brief of NAACP Legal Defense and Educational Fund, Inc., page 15) so contend, apparently in an attempt to convince this Court of how unpopular this suit was, and therefore, of how much adversity Respondents and their counsel had to surmount in order to win anything at trial.

But the facts are otherwise. First, the case was not tried locally, but in Los Angeles, more than sixty miles and another county removed from Riverside. There could not be, and was not, any local hostility in such a venue. Secondly, and even more important, since the undesirability of a case is one of the twelve *Johnson v. Georgia Highway Express, Inc.* (488 F.2d 714, 719 (5th Cir. 1974)) factors to be considered by a trial court before awarding attorney's fees under § 1988, and hence, an important "fact" if such was the case, one would expect such a "fact" to have been included by way of affidavit from one or more of the *Respondents* in any fee petition on behalf of any of the attorneys so affected. However, a review of the fee petition of Respondents herein (J.A. 16-64) discloses that there is not one word from *any* of the Respondents regarding their supposed difficulty in obtaining local counsel to represent their "unpopular" cause. The absence of this undesirability factor was duly noted by Petitioners in opposing Respondents' request for attorney's fees (J.A. 86-88). Thus, it was not at all surprising that thereafter, appearing in the trial court's Findings of Fact (J.A. 173; 189) was the wholly unsupported statement that "Given

the nature of this lawsuit, many attorneys within the community would have been reluctant to institute this action.''

Such a statement could not have been based on anything available to the trial court for its review. Still, as noted above, it was not surprising that such a statement appeared as a Finding of Fact, since, as also previously stated herein, the trial court's Findings were prepared, at its request, by the fee petitioners themselves (J.A. 222, 239-240). Of course, absent any evidence on the subject, this is not something of which a trial judge could be expected to take judicial notice, the events which formed the basis of the lawsuit and trial over which the district court presided, being separated by many miles and many years.

Indeed, much of the Respondents' Statement of Facts, and subsequent Argument, relies heavily on the trial court's comments and predispositions, rather than on the jury results. Not only is this bootstrapping at its worst, but it clearly points to the discrepancy between what the jury determined and what the trial court would have preferred that the jury had determined. However, the district judge was not the trier of fact herein, the jury was. And it is clear from what the jury found that the district court's account of the evidence—often aided, with its consent and at its request, by self-serving input from Respondents' counsel—is not plausible in light of the record reviewed in its entirety.

(c) Even Respondents' Introduction to its Statement of the Case is not spared their revisionist historical approach to what has transpired herein.

In what can only be described as an attempt to play fast and loose with reality, Respondents state that Petitioners have not challenged as "clearly erroneous" the trial judge's Findings of Fact with respect to (1) the prevailing market rate for similar services and (2) its finding that there were no facts which would justify a failure to compensate Respondents' counsel for the full value of the services which they performed herein (R.B. 2-3). Such grammatical hocus pocus highlights to what lengths Respondents apparently feel the need to go in order to rewrite this case into something it is not.

While it is true that Petitioners have never used the phrase "clearly erroneous" in challenging the above findings made by the trial court, nor have they ever specifically referred to *FRCP 52(a)* in making such a challenge, the record herein could not be more clear that these two findings (as well as many others) have been specifically challenged by the Petitioners at every stage of the proceedings herein, trial and appellate (J.A. 76-101; 161-163; see also Appellant's Reply Brief filed in the Ninth Circuit in June, 1981, in case number 81-5362, *Rivera v. City of Riverside, supra,* pp. 15-18). To state otherwise, as Respondents have in their Statement of the Case, would be to deny the existence of Petitioners' briefs and petitions filed previously over a period of more than five years. While one can understand why Respondents might wish to do so, to represent that such is the true state of affairs when clearly it is not, is inexcusable.

Moreover, the facts which underlie this matter, and as proven at trial, make the resulting award of attorney's fees to Respondents herein unique in the annals of civil rights litigation—at least with respect to the amount of

such fees when measured against the societal gains won by Respondents as a result of bringing their action. It is this reality alone which explains why Respondents have attempted throughout their Brief to justify the award of attorney's fees under review by attempting to "tack on" the results of their case with the results of other cases in which the facts were markedly different, so as to gain credibility thereby. However, in every instance where this ploy is tried, this factual dissimilarity is apparent. It is equally apparent that because this is so, that the award of attorney's fees herein was unreasonable, both under a fair reading of *Hensley, supra,* and under any reading of § 1988.

At times (R.B. 35) Respondents appear to be arguing that because the award of damages herein was relatively low, that their fee award should be supported by treating their case as if it were one in which no monetary relief was sought, and which broadly vindicated the rights of others. This strategy is a naked attempt to compare this case favorably with the many decisions in which it has been said that there need not be monetary damages to entitle attorneys to awards of significant attorney's fees (*Davis v. County of Los Angeles,* 8 E.P.D. ¶9444 (C.D. Cal. 1974); *Swann v. Charlotte-Mecklenburg Board of Education,* 66 F.R.D. 483 (W.D.N.C. 1975); and *Stanford Daily v. Zurcher,* 64 F.R.D. 680 (N.D. Cal. 1974), *aff'd* 550 F.2d 464 (9th Cir. 1977), *rev'd on other grounds,* 436 U.S. 547 (1978); B.R. 35).

However, the facts of the instant matter are quite different from those cases for which Respondents seek a favorable comparison. Here there was no issuance of declaratory or injunctive relief—and it serves Respondents not

to reflect that the trial court might have issued injunctive relief if only their counsel had asked for it after trial (R.B. 17, fn. 21), since, as Respondents' counsel have admitted, framing such relief would have been difficult, if not impossible (J.A. 219). Rather, at the trial herein nonpecuniary rights were never placed in issue by the Respondents, and the jury found all that Respondents asked of them by way of relief—monetary damages.

Likewise, it does not follow logically (R.B. 45) that because Respondents received a small amount of money damages that nonpecuniary results were also achieved by them. This case simply was not worth very much in money damages, and the jury found no basis for, and the trial court awarded, no other relief. The rights of none other than the eight Respondents were vindicated as a result of this litigation. No class was represented herein, counsels' after-the-fact attempts at such a characterization notwithstanding (R.B. 38, fn. 65). And as has been pointed out earlier in Petitioners' Brief on the Merits (P.B. 4), and as previously recognized herein by Justice Rehnquist (*City of Riverside v. Rivera*, — U.S. —, —, 106 S.Ct. 5, 6 (1985)), the City of Riverside was not compelled to, and did not change any of its practices or policies as a result of this suit. In sum, while Respondents benefited to the tune of $33,350 (of which $13,300 was attributable to Respondents' civil rights claims), and while their counsel stand to benefit in an amount more than seven times that sum ($245,456.25) should the award of attorney's fees below be upheld, society has not and will not benefit one whit from what was nothing more than a personal action for damages brought on behalf of eight individuals.

The conclusion regarding the lack of societal benefit gained in the bringing of this action is also compelled by

the basic inconsistency in Respondents' attempts to justify the district court's fee award. First, they paint a picture of the factual underpinnings of this lawsuit which, if true, would make this case just short of the outrage of the century (R.B. 5-13). Even if partially true, such a set of occurrences would have made this case a sure winner—a rich plum for any attorneys lucky enough to be retained to handle it—even given the rate of success of civil rights cases filed in the Central District of California (R.B. 27-28). It is clear, therefore, that if Respondents' Statement of Facts is accepted as true, that the vindication of their civil rights should have resulted in a large award of damages, assuming that a jury would view the "facts" as Respondents did, and be equally outraged as well.

Then, in a markedly different approach (R.B. 43-45), Respondents' counsel take the position that their performance was so heroic in obtaining even a $33,350 jury award for their clients, that they are entitled to attorney's fees seven times that amount as a result. This logic is based on a "new" set of facts, grounded on the premise that since this case was so difficult and so complex it required a high degree of litigation excellence to prevail *at all.*

The fallacy with such "logic" is that the instant case must fit one, or none, of these two diametrically opposed scenarios. It cannot fit both.

If this matter really arose out of such an egregious factual context—and constituted such a gross violation of the civil rights of the Respondents—it is inconceivable that the jury below wouldn't have awarded a larger sum of damages, assuming competent lawyering.

On the other hand, if counsels' professional work was so heroic, the only conclusion that can result therefrom is that the facts giving rise to this suit weren't so outrageous after all, and hence, that there really was no societal benefit to this litigation, over and above that received by the individuals involved.

The only other explanation offered by Respondents for the small amount of damages awarded by the jury—an explanation concurred in by the district court (J.A. 188-189)—was "the general reluctance of jurors to make large awards against police officers" (R.B. 44), a reluctance apparently not shared by the jurors in *Roman v. City of Richmond*, 570 F.Supp. 1544 (N.D. Cal. 1983) ($3,000,000); *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984) ($1,590,670); *Estate of Davis v. Hazen*, 582 F.Supp. 938 (C.D. Ill. 1983) ($575,000); *Herrera v. Valentine*, 563 F.2d 1220 (8th Cir. 1981) ($300,000); *Smith v. Heath*, 517 F. Supp. 774 (D. Tenn. 1980), *aff'd* 691 F.2d 220 (6th Cir. 1981) ($132,000); *Spears v. Conlish*, 440 F.Supp. 490 (N.D. Ill. 1977) ($100,000 assessed against a single police officer); *Bruner v. Dunaway*, 684 F.2d 422 (6th Cir. 1982), *cert. den.* 459 U.S. 1171 (1983) ($100,000); *Stokes v. Delcambre*, 710 F.2d 1120 (5th Cir. 1983) ($310,000 in punitive damages against a local sheriff and deputy), and in numerous other cases as well.

Once again, the facts as represented by reality, on the one hand, and the "facts" as used both by the district court and Respondents to justify the unjustifiable, on the other, are wildly different. Fortunately, the truth, as measured by the record herein, is not that difficult to ascertain.

CONCLUSION

For the foregoing reasons, Petitioners urge that the language of and legislative intent behind § 1988 compel a ruling by this Court that where there are no specific, verifiable societal benefits resulting from an action to enforce civil rights, any award of attorney's fees thereafter must be reasonably related to the amount of the pecuniary damages recovered by a plaintiff, where pecuniary damages are the only relief obtained therein. Since the within action clearly falls within such a definition, Petitioners pray that the judgment awarding attorneys' fees by the trial court below be reversed and the matter remanded for further proceedings consistent with such a ruling.

Respectfully submitted,

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